UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5

MOUNTAIRE FARMS, INC.

Employer

and Case 05-RD-256888

OSCAR CRUZ SOSA

Petitioner

and

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 27, a/w UNITED FOOD AND COMMERICIAL WORKERS INTERNATIONAL UNION, AFL-CIO

Union

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

Oscar Cruz Sosa (the Petitioner) filed the petition herein with the National Labor Relations Board (the Board) under Section 9(c) of the National Labor Relations Act (Act), seeking to decertify the United Food and Commercial Workers Union, Local 27 a/w United Food and Commercial Workers International Union, AFL-CIO (Union) as the exclusive collective-bargaining representative of roughly 800 employees employed by Mountaire Farms, Inc. (the Employer) at its Selbyville, Delaware facility. The sole issue in this proceeding is whether the instant petition is barred by the in-force collective-bargaining agreement that applies to the bargaining unit involved herein. The Petitioner and the Employer contend that the petition should proceed and that I should direct an election, arguing that the union-security clause contained in the operative collective-bargaining agreement is unlawful, thus removing the contract as a bar to an election. The Union counters that the union-security clause comports with extent Board law and meets all criteria for a lawful union-security clause, thus preserving the contract's ability to serve as a bar to a petition.[1]

A Hearing Officer of the Board heard this case on March 10, 2020, in Baltimore, Maryland, where the parties entered into several stipulations, and were given the opportunity to present evidence and state their respective positions on the record. Additionally, the parties were given the opportunity to submit post-hearing briefs for my consideration. I have reviewed the stipulations, the evidence, and the arguments presented by the parties, as well as the applicable

[1] As will be discussed below, the Union also argued at hearing, and in its initial position statement, that the petition was never perfected because the Petitioner did not file a Statement of Position by the appropriate deadline.

legal precedent. As will be discussed in detail below, I find that the collective-bargaining agreement in place between the Employer and the Union, based on the clearly unlawful union-security clause contained therein, cannot—and does not—serve as a bar to the processing of this petition. Accordingly, I will direct an election among the employees in the stipulated unit, described below.

I. FACTUAL OVERVIEW

The Employer operates a poultry processing plant in Selbyville, Delaware, at which it is engaged in growing, processing, and selling processed poultry products in wholesale and retail markets.[2] The Union is currently the exclusive collective-bargaining representative for the following unit of employees (Unit):

> All regular employees now employed or who may be employed by the Employer at their Selbyville, Delaware Poultry Processing Plant located at Hossier and Railroad Avenue on the Delmarva Peninsula, as follows: All production employees including but not limited to the following: live hangers, pinners, eviscerating, grading, cut-up, sawing, deboning, and other further processing employees, but excluding all employees currently covered under contract between Mountaire Farms of Delmarva and Local 355 of the Teamsters Union.[3]

According to the parties, the collective-bargaining relationship between them has existed since around 1978. Currently, the Employer and the Union are parties to a collective-bargaining agreement (Agreement) governing the terms and conditions of employment of the Unit. The Agreement was executed by the parties on February 8, 2019, but is effective by its terms from December 22, 2018, through December 21, 2023.

The preamble of the Agreement begins as follows:

> THIS AGREEMENT effective the **22nd day of December 2018** by and between MOUNTAIRE FARMS OF DELMARVA, INC., Selbyville, Delaware Poultry Plant

[2] The parties stipulated, and I find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and is subject to the jurisdiction of the Board.

[3] This unit description appears as it does in the parties' collective-bargaining agreement. At hearing, the parties stipulated to the following Unit description:

Included: All regular full-time and part-time production employees employed by the Employer at its Selbyville, Delaware Poultry Processing Plant currently located at Hoosier and Railroad Avenue on the Delmarva Peninsula, including but not limited to the following: live hangers, pinners, eviscerating, grading, cut-up, sawing, deboning, and other further processing employees.

Excluded: All other employees, including employees currently represented by Local 355 of the Teamsters Union; temporary employees; and managers, supervisors, and guards as defined in the National Labor Relations Act.

> located at Hoosier Street and Railroad Avenue, herein referred to as the 'EMPLOYER,' and UNITED FOOD AND COMMERCIAL WORKERS UNION, Local 27, Baltimore, Maryland herein referred to as the 'UNION' . . . (emphasis in original)

The Agreement's union-security clause is found in Article 3 of the Agreement, and is reproduced here in its entirety:

ARTICLE 3 – UNION SECURITY AND CHECK-OFF

1. It shall be a condition of employment that all employees of the Employer covered by this Agreement who are members of the Union in good standing on the execution date of this Agreement shall remain members in good standing, and those who are not members on the execution date of this Agreement shall, on or after the thirty-first day following the beginning of such employment, even if those days are not consecutive, shall become and remain members in good standing in the Union.

2. The Employer shall deduct periodic dues and initiation fees uniformly required as a condition of membership in the Union, and regularly authorized assessments on a weekly basis from the wages of each employee covered by this Agreement who has filed with the Employer a written assignment authorizing such deductions, which assignments shall not be irrevocable for a period of more than one (1) year or beyond the termination date of this Agreement whichever occurs sooner. Such dues, initiation fees and assessments shall be forwarded to the Union within fifteen (15) days. The Union will send the Employer a letter by certified mail notifying the Employer of any change in the amount of dues; initiation fees and assessments shall be kept separate and apart from the general funds of the Employer and shall be deemed trust funds.

3. The Union shall indemnify and hold the Employer harmless from any and all claims, demands, suits or other forms of liability which shall arise out of or by reason of action taken or not taken by the Employer in compliance with the provisions of Sections 1 and 2 of this Article.

The Agreement culminates with the following language: "Signed this 8th day of February 2019, by duly authorized representatives of the contracting parties hereto."

II. POSITIONS OF THE PARTIES

The predominant issue involved in this case is whether Article 3 of the Agreement is unlawful, resulting in the Agreement forfeiting its status as a bar to the instant petition. Additionally, the Union argued at hearing, though not in its post-hearing brief, that this petition should be dismissed because Petitioner did not file a Statement of Position prior to the applicable deadline. Below are the principle contentions of the parties.

1. The Union.

At the outset, the Union argues that the petition should be dismissed because the Petitioner did not file a Statement of Position by the deadline as articulated in the Notice of Hearing for filing of position statements. The Union argued at hearing that the Petitioner is required to file a Statement of Position, and because he did not do so, the petition should be dismissed.

The Union further asserts that the petition must be dismissed because it is barred by the Agreement. First, the Union argues that the Agreement's union-security clause bears all of the hallmark requirements for a valid union-security provision—it is not clearly unlawful on its face; it does not specifically withhold from incumbent nonunion members and/or new employees the statutory 30-day grace period, and a plain reading of the contract does not show to the contrary; and it is not incapable of lawful interpretation. The Union maintains that because the union-security clause is tied to the execution date of the contract, nonmember employees are actually granted 79 days from the effective date to become (or elect not to become) a Union member, much longer than the statutory requirements in Section 8(a)(3).

Moreover, the Union argues that "employment," as the term is used in Article 3, should be understood as employment after the Agreement was executed, not before. Once again, as it pertains to nonmember employees as of the execution date of the Agreement, Article 3 states ". . . and those who are not members on the execution date of this Agreement shall, on or after the thirty-first day following the beginning of such employment . . . become and remain members in good standing in the Union." The Union contends that the most natural reading of the phrase "such employment" is employment after execution of the Agreement, such that the statutory grace period for a nonmember employee employed sometime prior to the execution date of the Agreement did not begin to run until the Agreement was executed. The union-security clause only pertains to employment "covered by the agreement" and thus, according to the Union, employment covered by the union-security clause could not have begun prior to the execution date.

Lastly, the Union maintains that the Agreement, as well as Article 3, were not made effective retroactively. The Union argues that, throughout the Agreement, it is clear that it was intended to be effective beginning December 22, 2018, and was merely signed at a later date.

2. The Employer.[4]

Initially, the Employer and the Petitioner take the position that the Petitioner was not required by the Board's Rules and Regulations to file a Statement of Position prior to the hearing. According to the Employer, the Board's Rules and Regulations do not include a requirement that an petitioner for a decertification election must file a Statement of Position prior to a hearing. Thus, the Employer argues that Section 102.63(b)(3) of the Board's Rules and Regulations only mandates that an employer or certified or recognized representative of employees shall file a position statement prior to a hearing.

Moreover, both the Petitioner and the Employer argue that the petition should be allowed to move forward, as the Agreement does not bar me from processing the petition further. The

[4] Petitioner's positions on the issues involved herein align with the Employer. I will thus include the Petitioner's positions alongside the Employer's where appropriate.

Employer advances two arguments in support of its position. First, the Employer argues that Section 1 of Article 3 is unlawful in that it fails to provide the statutorily mandated 30-day grace period. In that regard, the Employer maintains that the express terms of the Agreement show it was retroactively effective—more than 41 days before the date it was signed. Thus, according to the Employer, by the time the contract was executed, the mandated 30-day grace period had already expired. Furthermore, the Employer argues that the phrase "such employment," as used in Section 1 of Article 3, refers to an individual's hire date with the Employer, not employment following the execution of the contract as espoused by the Union.

Secondly, the Employer argues that Section 2 of Article 3 is also unlawful. Article 3, Section 2, requires, among other things, that the Employer deduct regularly authorized assessments, in addition to periodic dues and initiation fees, from the wages of employees covered by the Agreement and who have filed with the Employer a written assignment authorizing such action. According to the Employer, the requirement that authorized assessments be paid is contrary to Supreme Court and Board precedent, citing *Ace Car and Limousine Service, Inc.*, 357 NLRB 359 (2011). Thus, because in its view both Section 1 and Section 2 of Article 3 are unlawful, the Employer argues that the Agreement cannot bar the instant petition.

III. APPLICABLE BOARD LAW

The Board's well-settled contract bar doctrine attempts to balance often competing aims of employee free choice and industrial stability. See, e.g. *Seton Medical Center*, 317 NLRB 87, 88 (1995). When a petition is filed for a representation election among a group of employees who are alleged to be covered by a collective-bargaining agreement, the Board must decide whether the agreement meets certain requirements such that it operates to serve as a contractual bar to the further processing of that petition. See *Hexton Furniture Co.*, 111 NLRB 342 (1955). The burden of proving that a contract is a bar is on the party asserting the doctrine. *Roosevelt Memorial Park, Inc.*, 187 NLRB 517 (1970).

An unlawful union-security clause in an otherwise in-force collective bargaining agreement will render that agreement incapable of barring a representation petition. "A clearly unlawful union-security provision for this purpose is one which by its terms clearly and unequivocally goes beyond the limited form of union-security permitted by Section 8(a)(3) of the Act, and is therefore incapable of a lawful interpretation." *Paragon Products Corp*., 134 NLRB 662, 666 (1961).[5] Importantly, the union-security clause must be clearly unlawful, as "[c]ontracts containing ambiguous though not clearly unlawful union-security provisions will bar representation proceedings in the absence of a determination of illegality as to the particular provision involved by the Board or a Federal court pursuant to an unfair labor practice proceeding." *Paragon Products Corp.*, 134 NLRB at 667. Thus, extrinsic evidence cannot be used to establish the illegality of the union-security provision—"[n]o testimony and no evidence will be admissible

[5] Section 8(a)(3) of the Act, in relevant part, states: "[t]hat nothing in this Act [subchapter], or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, which is the later . . ." National Labor Relations Act, 29 U.S.C. § 158(a)(3).

in a representation proceeding, where the testimony or evidence is only relevant to the question of the practice under a contract urged as a bar to the proceeding." *Id*. Unlawful union-security provisions include those which "specifically withhold from incumbent nonmembers and/or new employees the statutory 30-day grace period to comply with an otherwise-lawful union security clause (see Section 8(a)(3) of the Act)." *Id*. at 666.

Contracts that are, on their face, retroactively effective and that tie the union-security grace period to the effective date of the contract, thus depriving nonmember incumbent employees the 30-day grace period, will not bar a petition. *Standard Molding Corp*., 137 NLRB 1515, 1516 (1962). However, the mere fact that a contract is signed and executed by the parties on a date subsequent to the effective date of the contract does not, by itself, prove the retroactive nature of the contract. If the contract makes clear that the agreement was made and entered into, and effective on, a date earlier in time than the execution date, the Board will not find the contract to be retroactive. See *Federal-Mogul Corp.*, 176 NLRB 619 (1969); *Four Seasons Solar Products Corporation*, 332 NLRB 67 (2000); *Superior Laundry Services, LLC*, Case 29-RC-12093 (2011) (not reported in Board volumes).

The Board has also found union-security provisions to be unlawful when they "expressly require as a condition of continued employment the payment of sums of money other than 'periodic dues and initiation fees uniformly required.'" *Paragon Products Corp.*, 134 NLRB at 666. Furthermore, the Board has "consistently held that 'assessments' are not included within the meaning of the term 'periodic dues' as used in the proviso to Section 8(a)(3) permitting the execution of union-security agreements." *Santa Fe Trail Transportation Company*, 139 NLRB 1513, 1515 (1962). Once again, however, *Paragon Products* requires that a union-security clause which raises questions as to the lawfulness of an assessment-payment requirement must clearly be unlawful on its face to not bar an election.

III. ANALYSIS

1. <u>The Petitioner was not required by the Board's Rules and Regulations to file a Statement of Position prior to the hearing</u>.

Parties to a decertification petition that are required to file a Statement of Position prior to hearing are directed to Section 102.63(b)(3) of the Board's Rules and Regulations. There, the Board has detailed that, in decertification cases, "the employer and the certified or recognized representation of employees shall file with the Regional Director . . . their respective Statements of Position . . . by the date and time specified in the Notice of Hearing." Section 102.63(b)(3). The text of Section 102.63(b)(3) does not include a requirement that an decertification petitioner file a Statement of Position prior to hearing.[6] Indeed, the Notice of Hearing that issued in this proceeding on February 25, 2020, notified only the Employer and the Union that, pursuant to Section 102.63(b), they were required to complete and file the Statement of Position. The Petitioner was not required to file a Statement of Position prior to hearing. Accordingly, I find no

[6] Although advancing this argument at hearing, the Union did not brief this issue, and thus has not provided me with any authority to the contrary.

merit in the Union's argument that the petition must be dismissed because the Petitioner did not file a Statement of Position prior to the hearing.

2. Article 3, Section 1 is a clearly unlawful union-security clause, and thus the Agreement cannot serve as a bar.

As extent Board law requires, I am only permitted to examine the terms of the Agreement "as they appear within the four corners of the instrument itself" in assessing whether it retains is status as a bar to the instant petition. *Jet-Pak Corporation*, 231 NLRB 552, 553 (1977). There is no contention that the Agreement, outside of the challenged union-security clause, is defective or does not conform to the Board's requirements that define a lawful contract. Thus, in examining the Agreement, the sole issue for this proceeding is whether Article 3 is unlawful such that the Agreement cannot serve to bar the instant petition. After careful review of the Agreement, Article 3 and the above-cited Board precedent, I find that Article 3 is "incapable of a lawful interpretation" and cannot serve as a bar to the petition.

Specifically, I find that Article 3, Section 1, of the Agreement fails to afford nonmember incumbent employees the statutorily mandated 30-day grace period. I do so for the following reasons. Article 3, Section 1 effectively groups employees into two categories: the first is employees who are members of the Union in good standing at the time of the Agreement's execution, and the second are those employees that are not Union members at the time the Agreement was executed. With respect to the employees who are not Union members "on the execution date" of the Agreement, Article 3, Section 1 mandates that those employees "shall, on or after the thirty-first day following the beginning of such employment, even if those days are not consecutive, shall [sic] become and remain members in good standing in the Union." (emphasis added)

The parties acknowledge that while Section 8(a)(3) ties an employee's 30-day grace period to the later of the applicable contract's effective date or the date of employment, the Agreement in this case ties that grace period to the execution date of the Agreement. Yet while the language of Article 3, Section 1 provides nonmember incumbent employees 31 days to become Union members, it sets "the beginning of such employment" as the operative date to begin that 31-day period. Read literally, then, the only plausible interpretation of Article 3, Section 1 is that a nonmember employee as of the date of the Agreement's execution has 31 days following the beginning of that employee's employment to become and remain a member in good standing in the Union. Thus, any incumbent employee who was hired prior to the Agreement's execution date—February 8, 2019—would have been denied the statutorily mandated 30-day grace period. Because Article 3, Section 1 mandated that nonmember employees become Union members after 31 days following the beginning of their employment, and not 31 days following the execution of the contract, Article 3 is unlawful.

The Union reads Article 3, Section 1 of the Agreement to define "the beginning of such employment" as employment following the execution date of the contract. In other words, because Article 3, Section 1 speaks of employment "covered by this agreement," and no employment can be "covered" by the Agreement until the Agreement was executed, the Union argues that the grace

period in Article 3 begins on the date of execution for any nonmember incumbent employee employed as of that date. The Union's argument, though, is unavailing.

For all intents and purposes, the Union disregards any employment prior to the signing of the Agreement. However, that argument cannot be squared with other provisions in the Agreement, and the lawfulness of the union-security clause may be analyzed by reading it in the context of other clauses. See *H. L. Klion, Inc.*, 148 NLRB 656, 660 (1964). Article 5 – Wages – provides that "whenever any employee covered by this Agreement is receiving a higher rate than the minimum rate provided for at the time of the signing of this Agreement, such differential shall continue for the term of this Agreement." Clearly the parties understood that the Employer, at the time that the Agreement was executed, may have incumbent employees in its employ whose then-existing terms and conditions of employment would thereafter be governed by the Agreement upon its execution. I cannot then, as the Union suggests, view employees' employment with the Employer as that which exists only on and after the Agreement's execution date, because the Employer and the Union plainly considered the terms and conditions of Unit employees as they existed prior to execution of the Agreement. Therefore, a complete reading of the Agreement requires finding that the phrase "covered by this agreement" is meant to define which of the Employer's employees (i.e. the Unit) who would thereafter be subject to the Agreement, not that employment with the Employer can only be viewed from the Agreement's execution date forward. Accordingly, I find that the only plausible interpretation of the phrase "beginning of such employment" as used in Article 3, Section 1 is the beginning of an employee's employment with the Employer.

The union-security provision in Article 3 is not the only such clause to come before the Board that tied the union-security clause to the execution date of the collective-bargaining agreement. The Board found facially lawful a union-security clause that required that "those who are not members on the date of execution of this agreement shall, on the thirtieth day following the date of execution of this agreement, become and thereafter remain members in good standing in the [u]nion." *Checker Taxi Company, Inc.*, 131 NLRB 611, 615 fn. 11 (1961). Additionally, the Board found the following union-security provision, in relevant part, facially valid:

> [a]ll present employees who are not members of the [u]nion and all employees hired hereafter shall become and remain members of the [u]nion as a condition of employment on or after the thirtieth (30) day following the beginning of such employment or the effective date of this Contract or the date of execution of this Contract, whichever is later.

Local No. 25, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Tech Weld Corporation), 220 NLRB 76, fn. 2 (1975). See also *Roza Watch Corp*., 249 NLRB 284 (1980) (union-security provision required nonmember employees as of the execution of the agreement to become members on the 31st calendar day following the date of execution).

The difference between the facially valid union-security provisions cited above and Article 3 is obvious—those provisions explicitly afford nonmembers the statutorily mandated grace period following the execution date of the agreement to become members in good standing. Unlike those

provisions, however, Article 3, Section 1 of the Agreement does not afford nonmember incumbent employees 31 days before they must become a Union member following the execution of the agreement, nor does it state that nonmember employees must become Union members in good standing following the later of the beginning of their employment or the Agreement's execution date. Instead, the union-security clause in the Agreement requires that nonmember incumbent employees become Union members 31 days following the beginning of their employment, not 31 days following the execution of the contract. For that, the union security provision is unlawful.

The parties also disagree as to the retroactive nature of the Agreement. The Union asserts that the Agreement is not retroactive and makes clear that it became effective on December 22, 2018, and was merely executed at a later date, citing *Four Seasons Solar Products Corporation*, supra. On the other hand, the Employer cites *Standard Molding Corp*., supra, for the proposition that the instant Agreement is retroactive in nature, therefore arguing that grace period in Article 3 expired prior to the contract even being executed. Resolving this dispute is not necessary, as the union-security clause is tied to the execution of the contract, not the effective date. For that reason, whether the Agreement is retroactive is not relevant to this Decision.

For the foregoing reasons, I find that Article 3, Section 1 is incapable of a lawful interpretation. It is clearly unlawful on its face, as it does not afford nonmember incumbent employees the statutorily required 30-day grace period to become Union members. Board law is clear, then, that due to the unlawful nature of Article 3, Section 1, the Agreement cannot serve as a bar to the instant petition.

3. Article 3, Section 2 does not unlawfully require the payment of assessments as a condition of maintaining membership in the Union as argued by the Employer.

While I have determined that Section 1 of Article 3 renders the Agreement incapable of barring the instant petition, I nonetheless will address the Employer's second argument that Section 2 of the same Article equally violates Board law and should also serve to bar the instant petition. The Employer argues that Section 2's mandate that "assessments" be paid by Union members violates legal precedent which permits only "periodic dues and initiation fees" be paid in order to be considered a member in good standing. I do not find merit to the Employer's argument.

It is unlawful for a union-security provision to require, as a condition of achieving membership in good standing, the payment of anything beyond periodic dues and initiation fees. See *Paragon Products Corp.*, supra. Article 3, Section 2, however, does not tie "membership in good standing" to the payment of assessments. A plain reading of the Section supports this finding. As a condition of membership in the Union, Article 3, Section 2 requires that the Employer deduct uniformly required periodic dues and initiation fees. The clause then states that the Employer shall deduct regularly authorized assessments for employees covered by the Agreement who have filed with the Employer a written assignment authorizing such deductions. To be clear, Article 3, Section 2 does not condition Union membership on the payment of assessments or anything beyond periodic dues and initiation fees, and it only allows the Employer to deduct assessments

for those employees that have authorized the same. For those reasons, Article 3, Section 2 is not clearly unlawful on its face, and standing alone would not remove the bar status of the Agreement.

CONCLUSIONS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, as stipulated by the parties, and it will effectuate the purposes of the Act to assert jurisdiction therein.

3. The Union is a labor organization within the meaning of Section 2(5) of the Act.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer as stipulated by the parties, constitute a unit appropriate for the purposes of collective bargaining with the meaning of Section 9(b) of the Act:

> ***Included***: All regular full-time and part-time production employees employed by the Employer at its Selbyville, Delaware Poultry Processing Plant currently located at Hoosier and Railroad Avenue on the Delmarva Peninsula, including but not limited to the following: live hangers, pinners, eviscerating, grading, cut-up, sawing, deboning, and other further processing employees.
>
> ***Excluded***: All other employees, including employees currently represented by Local 355 of the Teamsters Union; temporary employees; and managers, supervisors, and guards as defined in the National Labor Relations Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by **United Food and Commercial Workers Union, Local 27 a/w United Food and Commercial Workers International Union, AFL-CIO**.

A. Election Details

The election details will be determined when able to be accommodated by the Regional Office after consultation with the parties. On March 19, 2020, because of the extraordinary

circumstances related to the COVID-19 pandemic, the Board temporarily suspended all Board-conducted elections through April 3, 2020. On April 1, 2020, the Board announced it would not extend that temporary suspension, and would instead resume conducting elections beginning Monday, April 6, 2020. The date, time, place, and manner of the election will be specified in the Notice of Election that the Board's Regional Office will issue subsequent to this Decision. If the election is postponed or canceled, I may, in my discretion, reschedule the date, time, place, and manner of election.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending immediately before the issuance of the Notice of Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.[7]

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the regional director and the parties by a date to be determined by the Regional Director, in light of the extraordinary

[7] The Union argued at hearing that the payroll eligibility date should be the payroll period ending date immediately preceding the filing of this petition. The Union contends generally that employee fluctuation necessitates using the payroll period ending date immediately prior to the petition being filed. Aside from in unusual circumstances, the payroll period ending date to be used in ordering an election is the latest completed payroll period preceding the date of issuance of the Notice of Election. I find that the Union has presented insufficient evidence to show that this is an unusual circumstance that warrants deviating from the Board's standard practice. Thus, the payroll eligibility date to be used herein is the payroll period ending date immediately preceding the issuance of the Notice of Election.

circumstances presented by the COVID-19 pandemic. The list must be accompanied by a certificate of service showing service on all parties. **The Region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlrb.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlrb.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election that will be issued subsequent to this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice and the ballots will be published in the following languages: English; Spanish; and Haitian Creole. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution. Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Issued at Baltimore, Maryland this 8th day of April 2020.

(SEAL)

/s/ Sean R. Marshall

Sean R. Marshall, Regional Director
National Labor Relations Board, Region 05
Bank of America Center, Tower II
100 S. Charles Street, Ste. 600
Baltimore, Maryland 21201